

SURENDRAN SHANMUGAM

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v.

THE DEPUTY MINISTER OF HOME AFFAIRS,
MALAYSIA & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
SU GEOK YIAM J
[CRIMINAL APPLICATION NO: 44-157-2011]
28 FEBRUARY 2012

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PREVENTIVE DETENTION: *Detention order - Habeas corpus - Application for issuance of writ of habeas corpus - Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 13 - Breach of - Failure of prison officers to affirm any affidavit-in-reply to depose they had been delegated the authority to issue orders by the Minister - Delegation of Powers Act 1956, s. 5 - Whether continued detention of applicant illegal and unlawful*

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The applicant was detained in the Machang Rehabilitation Centre under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') pursuant to a detention order ('the detention order') for two years. The applicant filed a notice of motion for the issuance of a writ of *habeas corpus* against the respondents for his immediate release from his detention under the detention order on grounds that his detention was unlawful, null and void. It was the applicant's submission that there was non-compliance with s. 13 of the Ordinance because the two prison officers who purportedly issued the two orders to produce the applicant from the Rehabilitation Centre at the places on the dates specified in the orders did not affirm affidavits-in-reply to depose that they had the authority to do so. The respondents, however, argued that the Deputy Superintendent of Prisons could exercise the power which was delegated to the Superintendent of Prisons, by the Minister of Home Affairs ('the Minister') in the same way the Deputy Minister could exercise the powers of the Minister.

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Held (allowing applicant's application):

- (1) It is an established principle of law that the third respondent who was the detaining authority bore the onus of proving that the applicant's detention was lawful in accordance with the law (*SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors*; refd) (paras 27 & 28)

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- A (2) The wording of s. 13 of the Ordinance is clear and unambiguous. The section expressly confers upon the Minister the power to order the production of a detenu at a place outside the detention centre if he is satisfied, *inter alia*, that it is in the interests of justice, and to specify the date, place and
- B if, he thinks fit, the person who is having the custody of the detenu at the place concerned. (para 30)
- (3) During the duration of the detention order, the applicant was taken out of the Rehabilitation Centre and to the Petaling Jaya Magistrate's Court on two occasions as specified in the two impugned orders but the two prison officers, namely, Mohd Zamri Ngah and Zakaria Raxali, did not affirm any affidavit-in-reply to depose that they had been delegated the authority to issue the two orders by the Minister pursuant to s. 5 of the Delegation of Powers Act 1956. Therefore, there was a serious doubt whether the production of the applicant at the two places was authorised by the Minister. This breach of s. 13 of the Ordinance had rendered the continued detention of the applicant under the detention order by the third respondent to be illegal and unlawful. Consequently, the court granted to the applicant a writ of *habeas corpus* for his immediate release from his unlawful detention. (paras 31 & 33)
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Case(s) referred to:

- F *Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Ors* [1992] 2 CLJ 1037; [1992] 2 CLJ (Rep) 816 HC (**refd**)
SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 FC (**refd**)
Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Ong Beng Chuan [2006] 4 CLJ 703 FC (**dist**)

G Legislation referred to:

- Criminal Procedure Code, s. 365(1)(b)
Delegation of Powers Act 1956, s. 5
Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(2), 4(1), 5(2)(b), 6, 13
- H Emergency (Public Order and Prevention of Crime) (Procedure) Rules 1972, rr. 3(2) 5(1)
Federal Constitution, arts. 5(1), 151(1), (2)
Interpretation Acts 1948 and 1967, ss. 7, 50

- I *For the applicant - Alvinthiren; M/s Alvinthiren & Partners*
For the respondents - Amir Nasruddin (Mohd Zain Ibrahim with him); SFC
Reported by Suhainah Wahiduddin

JUDGMENT**A****Su Geok Yiam J:****Background**

[1] The applicant was detained in the Machang Rehabilitation Centre, Kelantan under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (the “Ordinance”) pursuant to a detention order, (the “detention order”), dated 31 May 2010 for two years from that date issued by the 1st respondent under s. 4(1) of the Ordinance.

B**C****Applicant’s Application**

[2] On 23 June 2011, the applicant filed a notice of motion, at encl. (3) together with a certificate of urgency at encl. (4) and a supporting affidavit affirmed by the applicant on 2 June 2011 at encl. (2), pursuant to s. 365(1)(b) under chapter XXXVI of the Criminal Procedure Code for the issuance of a writ of *habeas corpus* against the respondents for his immediate release from his detention under the detention order because his detention by the 2nd respondent under the detention order was unlawful, null and void.

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[3] He relies on the following grounds:

- (i) The 1st respondent has acted *mala fide*, mechanically, automatically and arbitrarily in issuing the detention order, exh. “SS-1” of the applicant’s supporting affidavit;
- (ii) The 3rd respondent and the police have failed and neglected to inform him the reasons for his arrest at the time he was arrested;
- (iii) The police did not carry out any investigation against him during the duration of his detention under s. 3 of the Ordinance;
- (iv) The contents of the detention order and the grounds for the detention order were not explained to him thereby causing him serious prejudice;
- (v) There was no due consideration of his representation by the Advisory Board which also did not make any recommendation to the Yang Di Pertuan Agong as provided in s. 6 of the Ordinance and art. 151(1)(b) of the Federal Constitution; and

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- A (vi) He was not in any way involved in the charges contained in annexure E (exhibited, collectively, with a copy of the detention order as exh. “SS-1” in the applicant’s supporting affidavit).
- B [4] In his supporting affidavit, he has contended that his detention by the 3rd respondent and the police and also his detention by the 2nd respondent under the detention order issued by the 1st respondent were unlawful and invalid because they were done in breach of arts. 5(1) and 151(2) of the Federal
- C Constitution, there was non-compliance by the respondents with the provisions of ss. 3(2), 4(1), 5(2)(b) and 6 of the Ordinance and there was also non-compliance with r. 3(2) and r. 5(1) of the Emergency (Public Order and Prevention of Crime) (Procedure) Rules, 1972 (the “Rules”).
- D [5] He has also made several other allegations of fact and law against the respondents in paras. 9 to 14 in his supporting affidavit.
- E [6] In para. 15 of his supporting affidavit he has relied on the following grounds in the Malay language to challenge his arrest, detention and the detention order:
- F 15. Saya juga menyatakan bahawa tangkapan saya serta penahanan selanjutnya di Pusat Pemulihan Akhlak, Machang, Kelantan adalah tidak sah disisi undang-undang dan tidak teratur diatas alasan-alasan berikut:
- G (a) terdapat pelanggaran terhadap peruntukan Perkara 5(1) Perlembagaan Persekutuan iaitu tahanan terhadap saya adalah tidak sah disisi undang-undang;
- H (b) terdapat pelanggaran terhadap peruntukan Perkara 5(3) Perlembagaan Persekutuan apabila saya ditangkap dan ditahan oleh pihak polis seperti yang telah saya nyatakan diatas serta penahanan saya di Pusat Pemulihan Akhlak, Machang, Kelantan;
- I (c) terdapat pelanggaran terhadap Seksyen 3 Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah)1969 iaitu penangkapan dan tahanan selanjutnya tidak diikuti dengan betul dan menurut undang-undang;
- (d) terdapat pelanggaran terhadap peruntukkan Perkara 5(4) Perlembagaan Persekutuan kerana saya tidak dibawa kehadiran Majistret apabila ditangkap dan ditahan;

- (e) pegawai yang menangkap saya tidak membuat tangkapan menurut Seksyen 3 Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969; A
 - (f) penahanan saya sebelum perintah tahanan dikeluarkan tidak mengikut undang-undang dan pihak polis telah gagal untuk mengikut undang-undang yang sedia ada; B
 - (g) terdapat pelanggaran terhadap Seksyen 4 Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 iaitu salinan perintah yang dikemukakan kepada saya adalah bukan perintah mengikut undang-undang; C
 - (h) terdapat pelanggaran terhadap Seksyen 5 Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 iaitu saya tidak diserahkan dengan alasan-alasan dan tuduhan-tuduhan fakta yang diberikan oleh Timbalan Menteri Keselamatan Dalam Negeri serta saya tidak diterangkan dengan maksud perintah serta alasan berkenaan; D
 - (i) terdapat pelanggaran terhadap Seksyen 5(1) dan (2) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 dimana saya tidak dimaklumkan tentang hak representasi saya. E
 - (j) terdapat pelanggaran terhadap Kaedah-Kaedah Ordinan tersebut apabila saya tidak diberitahu tentang hak representasi dan tidak diserahkan dengan dokumen-dokumen menurut kaedah-Kaedah di Pusat Pemulihan Akhlak, Machang, Kelantan; F
 - (k) terdapat pelanggaran terhadap Kaedah 6 Kaedah-Kaedah Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1972
 - (l) terdapat pelanggaran terhadap Seksyen 5, dan 6 Ordinan tersebut; G
 - (m) alasan-alasan perintah tahanan terkeluar dari skop Ordinan tersebut;
 - (n) pelanggaran hak asasi saya yang terjamin dibawah Perkara 151 Perlembagaan Persekutuan; H
- Dengan demikian saya memohon Mahkamah Yang Mulia ini member relif-relif sepertimana dipohon dalam Notis Usul yang difailkan bersama-sama disini. I

A Respondents' Nine Affidavits-In-Reply

[7] The respondents have filed a total of 9 (nine) affidavits-in-reply to deny, dispute and rebut the grounds and allegations relied upon by the applicant.

B [8] The nine affidavits in reply were affirmed by the following persons:

(a) Datuk Wira Abu Seman Yusop, the Deputy Minister of Home Affairs, Malaysia, on 12 August 2011, encl. (7);

C (b) Azwiralbukhairi bin Abd Aziz, the Secretary to the Advisory Board at the Prime Minister's Department, Putrajaya, Malaysia, on 12 August 2011, encl. (8);

D (c) DSP Chelvam s/o Ramiah Pillai, a senior police officer in the Criminal Investigations Division (D7), at the Royal Malaysian Police Force Headquarters, Bukit Aman, Kuala Lumpur, on 12 August 2011, encl. (9);

E (c) SAC Dato' Hasnan bin Hassan, the Deputy Director in the Criminal Investigations Division (D7), at the Royal Malaysian Police Force Headquarters, Bukit Aman, Kuala Lumpur, on 12 August 2011, encl. (10);

F (d) Khairul Iswadi bin Ishak, the Assistant Secretary of the Ministry of Home Affairs, Malaysia, on 12 August 2011, encl. (11);

(e) Zulkifli bin Abdul Manah, the Assistant Director of Prisons at the Rehabilitation Centre, Machang, Kelantan, on 12 August 2011, encl. (12);

G (f) L/Kpl Jegathesan s/o Murugiah, a senior police officer in the Criminal Investigations Division, at the Kota Bharu Police District Headquarters, Kelantan, on 12 August 2011, encl. (13);

H (g) Murali s/o Arumugon, the prison warden at the Rehabilitation Centre, Machang, Kelantan, on 12 August 2011, encl. (14); and

I (h) Mazuki bin Mhd Ghazali, the prison warden at the Rehabilitation Centre, Machang, Kelantan, on 12 August 2011, encl. (15).

Applicant's One Affidavit In Reply

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[9] The applicant filed an affidavit in reply which he affirmed on 26 September 2011, encl. (19), to the respondents' nine affidavits in reply.

Respondents' Five Affidavits-In-Reply

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[10] The respondents' filed 5 (five) affidavits in reply to deny and rebut the allegations contained in the applicant's affidavit in reply.

[11] They were affirmed by the following persons:

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(a) SAC Dato' Hasnan bin Hassan, the Deputy Director of the Criminal Investigations Division (D7), at the Royal Malaysian Police Force Headquarters, Bukit Aman, Kuala Lumpur, on 21 October 2011, encl. (21);

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(b) DSP Chelvam s/o Ramiah Pillai, a senior police officer in the Criminal Investigations Division (D7), at the Royal Malaysian Police Force Headquarters, Bukit Aman, Kuala Lumpur, on 21 October 2011, encl. (22);

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(c) Datuk Wira Abu Seman Yusop, the Deputy Minister of Home Affairs, Malaysia, on 21 October 2011, encl. (23);

(d) Azwiralbukhairi bin Abd Aziz, the Secretary to the Advisory Board at the Prime Minister's Department, Putrajaya, Malaysia, on 21 October 2011, encl. (24);and

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(e) Mohd Ismawi bin Sulong, the Deputy Superintendent of Prisons and the Officer-in-Charge of Prisons at the Rehabilitation Centre, Machang, Kelantan, on 21 October 2011, encl. (25);

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Applicant's Submissions

[12] On 31 October 2011, the first date fixed for the hearing of the applicant's application, his learned counsel applied for a postponement to reply to the five affidavits in reply which were filed by the respondents and served on him on 28 October 2011 because the applicant's learned counsel's office was closed during the Deepavali festival.

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[13] The court adjourned the hearing to 21 November 2011.

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A [14] On 17 November 2011, the applicant put in his outline submissions in which he raised two grounds thereby abandoning the rest of the grounds as contained in his application and supporting affidavit.

B [15] The two grounds are as follows:

(a) There was non-compliance with s. 13 of the Ordinance on the part of the 2nd respondent; and

C (b) There was a failure on the part of the Deputy Minister and also the police officer, who was designated by the IGP to forward the report on the circumstances of the arrest and detention of the applicant to the Deputy Minister before the Deputy Minister issued the detention order, to apply their minds to the merits of the applicant's detention before the issue of the detention order.

E [16] On the second date fixed for the hearing of the applicant's application, ie, 21 November 2011, the applicant relied only on one ground to challenge the applicant's detention under the detention order thereby abandoning the 2nd ground.

[17] The sole ground is as follows:

There was non-compliance with s. 13 of the Ordinance on the part of the 2nd respondent.

F On the sole ground, the applicant's learned counsel has submitted that there was non-compliance with s. 13 of the Ordinance because the two prison officers who purportedly issued the two orders to produce the applicant from the Rehabilitation Centre at the two places and on the dates specified in the two orders did not affirm the affidavits in reply to depose that they had the authority to do so. Hence there was a doubt whether they were authorized to do so.

H **Respondents' Submissions**

I [18] The learned federal counsel has submitted that there was no merit in the sole ground because the Deputy Superintendent of Prisons could exercise the power which was delegated to the Superintendent of Prisons, by the Minister of Home Affairs (the "Minister") in the same way the Deputy Minister could exercise the powers of the Minister.

[19] He relied on ss. 7 and 50 of the Interpretation Acts 1948 and 1967 and also cited the case of *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Ong Beng Chuan* [2006] 4 CLJ 703 in support of his submissions. A

Applicant's Submissions In Reply

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[20] The applicant's learned counsel distinguished that case on the ground that the prison officer concerned had affirmed an affidavit in reply to depose that he had the authority.

[21] The applicant's learned counsel also cited the case of *Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Ors* [1992] 2 CLJ 1037; [1992] 2 CLJ (Rep) 816 in support of his submissions. C

Decision Of This Court

[22] This court agreed with and accepted the submissions of the applicant's learned counsel that the sole issue had merit. D

[23] This court, therefore, allowed the applicant's application for the issue of a writ of *habeas corpus* for his immediate release. E

[24] Being dissatisfied with the decision of this court the respondents have filed a notice of appeal to the Federal Court on 16 December 2011.

Reasons For The Decision Of This Court

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[25] Below are the reasons why this court allowed the applicant's application:

[26] The court was of the respectful view that the case of *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Ong Beng Chuan, supra*, was inapplicable to the facts of the instant case for the reason advanced by the applicant's learned counsel. G

[27] It is an established principle of law that the 3rd respondent who is the detaining authority bore the onus of proving that the applicant's detention was lawful in accordance with the law. H

[28] In the case of *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors* [2009] 6 CLJ 705, the Federal Court held, *inter alia*, that on an application for a writ of *habeas corpus* the burden of satisfying the court that the detention is lawful lies I

A throughout on the detaining authority. In that case, Gopal Sri Ram FCJ in delivering the decision of the Federal Court said as follows in paras. 5 and 6 at pp. 710 - 711:

B [5] In my considered judgment the point at stake falls to be resolved with reference to the principles governing the burden of proof in an application for *habeas corpus*. It is settled law that on an application for *habeas corpus* the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority. See, *Chng Suan Tze v. The Minister of Home Affairs & Ors And Other Appeals* [1988] 1 LNS 162. In *Mohinuddin v. District Magistrate, Beed AIR* [1987] SC 1977, the Supreme Court of India observed as follows in the context of art. 22 of the Indian Constitution from which is drawn our art. 151:

D It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Art. 22(5).

[29] Section 13 of the Ordinance provides as follows:

F 13. Power to order production of detained person.

G (1) On proof to his satisfaction that the presence at any place of any person detained under the provisions of section 4, or lawfully in the custody of the police or confined in any prison whether in pursuance of the provisions of section 4 or under an order of any Court or otherwise howsoever, and notwithstanding any order of any Court or other authority whatsoever, is required in the interests of justice, or for the purpose of any public or other inquiry, or in the national interest or in the interests of the person detained, in custody, or confined, the Minister may order that such person be taken to that place.

H (2) Any person in the course of being taken to any place in pursuance of the provisions of sub-section (1) and whilst at such place shall be kept in such custody as the Minister may direct and whilst in that custody shall be deemed to be in lawful custody.

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[30] The court was of the view that the wording of s. 13 is clear and unambiguous. The section expressly confers upon the Minister the power to order the production of a detenu at a place outside the detention centre if he is satisfied, *inter alia*, that it is in the interests of justice and to specify the date, place and, if he thinks fit, the person who is having the custody of the detenu at the place concerned.

[31] In the instant case it is undisputed that during the duration of the detention order the applicant was taken out of the Rehabilitation and to the Petaling Jaya Magistrate's Court on the two occasions as specified in the two impugned orders but the two prison officers, namely, Mohd Zamri bin Ngah and Zakaria Bin Raxali did not affirm any affidavit in reply to depose that they had been delegated the authority to issue the two orders by the Minister pursuant to s. 5 of the Delegation of Powers Act 1956. Therefore, there was a serious doubt whether the production of the applicant at the two places was authorized by the Minister. This breach of s. 13 of the Ordinance had rendered the continued detention of the applicant under the detention order by the 3rd respondent illegal and unlawful (see the case of *Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Ors*, *supra* [1992] 2 CLJ 1037; [1992] 2 CLJ (Rep) 816).

Conclusion

[32] In view of the matters as stated above, the court was satisfied that there was a non-compliance with a condition precedent or mandatory procedural requirement as set out in s. 13 so as to render the applicant's continued detention under the detention order unlawful, invalid, null and void.

[33] Consequently, the court granted to the applicant a writ of *habeas corpus* for his immediate release from his unlawful detention.

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